

# Combating Migrant Smuggling by Sea: Analysis of EU Action Plan Against Migrant Smuggling and Standards of Migrant Smuggling Protocol

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Migrant smuggling is one of the main issues challenging national security systems. This issue also threatens common international security. Migrant smuggling toward European countries is mainly organized through maritime routes. Therefore, to treat this issue in a more focused way, the purpose of this paper is to address the issue of migrant smuggling standards and regulations that are promoted by the Protocol against the Smuggling of Migrants, with a special emphasis on migrant smuggling by sea. In addition, this paper aims to address the EU policy regarding the prevention and combating of migrant smuggling by sea. From the data obtained from this study, we can understand that the issue of preventing and combating migrant smuggling by sea is addressed by some standards of the Protocol against the Smuggling of Migrants, which has been ratified by 152 of the UN Member States and serves as an important basis to facilitate the prevention and combating of migrant smuggling by sea. Furthermore, the European Union has addressed the issue of migrant smuggling by sea, and based on the findings so far, this issue has become an important part of the EU Security Union Strategy, the EU action plan against migrant smuggling, and several other important documents in the EU. The investigation and prosecution of this form of transnational organized crime requires a coordinated approach between the authorities of the countries whose laws are violated by this form of criminality.

## KEY WORDS

- ~ Migrant Smuggling;
- ~ Sea;
- ~ EU action plan;
- ~ Migrant Smuggling Protocol

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## 1. INTRODUCTION

Preventing and fighting migrant smuggling is one of the contemporary global challenges that many countries are facing. Although there are many international instruments aimed at preventing or fighting this form of organized crime, not enough has ever been done to curb and control this form of crime. Although there are institutional mechanisms and the national legal framework to deal with this form of criminality, it has never been possible to provide an effective solution to this issue without mutual cooperation between the States that are directly affected.

While States exercise State sovereignty only within their own territories including the maritime part, to the extent permitted by the rules of international law, a challenging issue is the issue of dealing with criminality on the high seas, i.e., on ships that smuggle immigrants. Precisely for this purpose, to provide a more progressive solution to the issue of migrant smuggling, many efforts have been made to draft international instruments that would facilitate the prevention and combating of migrant smuggling that takes place across the open sea. The initial proposal for a legal instrument to deal with migrant smuggling was presented to the Commission on Crime Prevention and Criminal Justice by the Austrian government in 1997. Italy also asked for an international instrument to deal with migrant smuggling by sea. Italy and Austria came together around this idea to draft an international instrument that would deal with migrant smuggling in the context of transnational organized crime (Gallagher, A., 2001). So, this was judged to be a transnational problem and, therefore, an international organized-crime problem. Furthermore, it was a problem that required an international response (Brolan, 2002).

The international instrument that was drafted by this initiative was the Protocol against the Smuggling of Migrants by Land, Air, and Sea, which was signed in 2000 and entered into force in 2004. This instrument complements the United Nations Convention against Transnational Organized Crime. In the preamble of this instrument, it is emphasized that the main purpose of this instrument is to be useful for preventing and fighting this form of crime. This is not only to increase the security of the States that work to prevent and combat this type of criminality, but also to protect the rights of people involved in smuggling through various transnational organized crime groups (UN General Assembly, 2000a). The purpose of the Protocol against the Smuggling of Migrants is twofold: firstly, to prevent and combat the smuggling of migrants, paying special attention to the protection of women and children; secondly, it aims to encourage and facilitate cooperation between the States Parties to this instrument. This instrument aims to prevent and fight the smuggling of migrants that is carried out by criminal groups of organized crime that have transnational elements. States Parties are required to take legislative and other necessary measures to criminalize migrant smuggling and its accompanying elements (UN General Assembly, 2000a & Brolan, 2002).

By 2023, 152 countries have joined the Protocol against the Smuggling of Migrants, which reflects a serious commitment and readiness to the issue of fighting and preventing this form of criminality. Despite the fact that this important legal framework has been created, it has not fundamentally changed the approach to this form of criminality since, even before the drafting of this instrument, the rules of international law have been strong in order to preserve the sovereign aspect of the States. This is reflected even after the adoption of this instrument as the relevant international legal framework is older and significantly wider; that includes a dense network of rights, obligations, and responsibilities derived not only from the Protocol against the Smuggling of Migrants and the Convention against Transnational Organized Crime, but also from the law of the sea, human rights law, and refugee law (Gallagher and David, 2014).

Considering that the treatment of smuggling is a rather broad issue addressed by a number of important international instruments and by all the national jurisdictions of the States separately, and also considering that the issue of migrants simultaneously requires an integrated and holistic approach, for the practical purposes of this scientific paper, the study will focus on analyzing and comparing the international standards for preventing

and combating the smuggling of migrants by sea that are promoted by the Protocol against the Smuggling of Migrants. In addition, it is intended to address the approach that the EU is following regarding the prevention and combating of this form of criminality.

This scientific paper will first deal with migrant smuggling in general, and especially the standards promoted by the Protocol against the Smuggling of Migrants. It will also deal with the similarities and differences between migrant smuggling and human trafficking. A detailed overview of the elements that make up migrant smuggling will also be given. An important aspect of this scientific paper will be the treatment of EU policy related to people smuggling by sea, i.e., the EU Security Union Strategy and the EU action plan against migrant smuggling. Finally, the standards and rules promoted by the Protocol against the Smuggling of Migrants will be addressed, with special emphasis on the smuggling of migrants by sea, where special focus will be put on dealing with the measures that can be taken against ships having the flag of another State, as well as the measures that can be taken against flagless ships and Stateless ships. The question of investigating and prosecuting the smuggling of migrants by sea will also be addressed, i.e., the investigative techniques that are applied to this form of criminality, as well as the importance of the cooperation of the States to prevent and combat this form of criminality.

## 2. SMUGGLING OF MIGRANTS

The term *smuggling of migrants* has many different definitions. At the international level, the term *smuggling of migrants* is defined by Article 3(a) of the Protocol against the Smuggling of Migrants by Land, Air, and Sea as “*the procurement for the purpose of obtaining financial or material benefit, directly or indirectly, from the illegal passage of a person into a State Party in which he or she is not a citizen or permanent resident*” (UN General Assembly, 2000a), whereas Article 6 of this instrument requires the State Parties to criminalize this behavior as a criminal offense and also provides that the States must take other legislative measures to qualify this situation as a criminal offense, provided that the offense is committed intentionally and the smugglers benefit financially or materially, directly or indirectly.

Due to the specifics that migrants have, according to Article 5 of the Protocol against the Smuggling of Migrants, migrants cannot be subject to criminal prosecution, i.e., they are exempt from criminal responsibility for their actions. However, this instrument does not include any obligations requiring the States to criminalize the behavior of people close to migrants who assist migrants for humanitarian reasons rather than for financial or material gain (UNDOC, 2010).

At the level of the European Union, the issue of dealing with migrant smuggling receives significant attention, which can also be seen from the instruments issued at the level of the European Union and its Member States. At the level of the European Union, two of the most important instruments that address the issue of migrant smuggling are: Council Directive 2002/90/EC on defining the facilitation of unauthorized entry, transit, and residence, and Council Framework Decision on the strengthening of the penal framework to prevent the facilitation of unauthorized entry, transit, and residence (2002/946/JHA).

The purpose of the Council Directive 2002/90/EC on defining the facilitation of unauthorized entry, transit, and residence is to provide a definition of the facilitation of illegal immigration and, consequently, to make more effective the implementation of the Council framework Decision on the strengthening of the penal framework to prevent the facilitation of unauthorized entry, transit, and residence. The treatment of the phrase *smuggling with migrants* is also defined by the Council Directive 2002/90/EC on defining the facilitation of unauthorized entry, transit, and residence, which determines that for the purposes of sanctioning the smuggling of migrants that is required by the Member States, some elements that should be included in the national legislations of the Member States constitute all the elements by which migrant smuggling can be defined. These elements are as follows: “(a) any person who intentionally assists a person who is not a national of a Member

*State to enter or transit across the territory of a Member State in breach of the laws of the State concerned on the entry or transit of aliens; (b) any person who, for financial gain, intentionally assists a person who is not a national of a Member State to reside within the territory of a Member State in breach of the laws of the State concerned on the residence of aliens.”* (Council of the European Union, 2002a).

## 2.1. Elements of smuggling of migrants

In the Protocol against the Smuggling of Migrants, all the elements that make up the smuggling of migrants are not given in detail and clearly. Therefore, an analysis would have to be done in the general context to understand the structure of the crime. In this regard, the elements necessary to define migrant smuggling are scattered throughout the text of this instrument, making a holistic analysis necessary. Brolan (2002) emphasizes that the *mens rea* and *actus reus* should be clearly stated in this international instrument in such a way as to make clear the definition of migrant smuggling (Brolan, C., 2002). *Mens rea* and *actus reus* are included in Article 6 of the Protocol, as this article expressly provides that this offense must be committed intentionally, as well as the elements of action in the way this criminal offense is committed.

From the analysis of the content of the Protocol against the the Smuggling of Migrants by Land, Air, and Sea, we can draw the conclusion that this instrument defines some necessary elements that make up the concept of the smuggling of migrants. In this regard, three basic elements that make up this concept are identified, i.e., the element of action, the element of financial or material benefit, and the element of consent. (Aljehani, 2015).

First, according to the legal definition of migrant smuggling, the element *action* can be defined on the basis of the phrase “*the procurement... of the illegal entry of a person into a State Party*” (Aljehani, 2015). In this regard, there are substantial discussions regarding the interpretation of the term *procurement* as there is no further treatment of this element by this instrument. There are already different theoretical positions that give such opinions, interpreting this term narrowly, but also broadly. On the other hand, the Protocol against Trafficking in Human Beings specifies the constituent elements that define the concept of human trafficking, which does not include other elements in the definition of migrant smuggling. However, there is no restriction for the States to expand the elements related to the definition of migrant smuggling when drafting their domestic legislation, as this protocol only sets the minimum standards, and the States are free to choose the appropriate way to adapt to the specifics of problems encountered in practice (Aljehani, 2015).

Second, the element of *purpose of financial or material gain* is the purpose of committing the criminal offense. Article 3(a) of the Protocol, which defines the legal definition of migrant smuggling, stipulates that the act of smuggling must be carried out for “*a financial or other material benefit*”. The phrase “*financial benefit or any other material benefit*” is not even defined in Article 3 of the Protocol (Aljehani, 2015). As in most international instruments, the Member States' national legislations leave them considerable space to implement the provisions of this Protocol. In this regard, a highly discussed issue at the national level is the inclusion of the element of “*purpose of financial or material gain*” as one of the necessary elements that would constitute the criminal offense of migrant smuggling. Due to the practical specifics and the insufficiency of documenting this fact in criminal proceedings, most States have not foreseen the element of “*purpose of financial or material gain*” as a necessary element to define this criminal offense. Even the European Union aims for the Member States to harmonize their national legislation, not foreseeing as a necessary element the “*purpose of financial or material gain*” in the definition of the criminal offense of migrant smuggling (UNDOC, 2018).

The issue of not including the element of “*the purpose of financial or material gain*” in the definition of the criminal offense of migrant smuggling may bring the persons who can provide assistance to the smuggled persons into an incriminating situation. Although there are no such cases in practice, it is critical that in situations where the humanitarian motive and no other motive is clearly demonstrated, those involved in assisting migrants

for purely humanitarian reasons and not for material gain are not prosecuted (UNDOC, 2018). In this regard, Council Directive 2002/90/EC on defining the facilitation of unauthorized entry, transit, and residence provides for the possibility that each Member State may not impose sanctions for this criminal offense in cases where the purpose of the conduct is to provide humanitarian aid to the person in question (Council of the European Union, 2002a).

Third, consent is one of the fundamental elements that distinguishes human trafficking from migrant smuggling. Although the legal definition of migrant smuggling in Article 3(a) of the Protocol does not explicitly include the element “*consent*”, it can be considered a predetermined element within this definition (Aljehani, 2015).

## **2.2. Key differences between smuggling of migrants and trafficking in persons**

Due to many common elements that migrants, refugees, and trafficked persons have, it is essential to distinguish between the concepts (Iselin and Adams, 2003). In the above section, the concept and elements of migrant smuggling were dealt with, while in the following, the concept of human trafficking will be dealt with and the differences between these two concepts will be clarified. Human trafficking is dealt with by another protocol of the Palermo Convention, i.e., the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime. For the purposes of this Protocol, according to Article 3, “*trafficking in persons*” shall mean “*the recruitment, transportation, transfer, harboring, or receipt of persons by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability, or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude, or the removal of organs*” (UN General Assembly, 2000b). In a significant number of situations, it can be difficult to distinguish human trafficking from migrant smuggling. The differences between smuggling and trafficking are often very subtle, as some trafficked people may begin their journey by agreeing to enter a country illegally but later become victims of human trafficking as their trust is abused (UNDOC, 2010). The element of consent is important in distinguishing between smuggling and human trafficking. But, however, even though the element of consent is very important to assess the situation. If there are elements of migrant smuggling and there are no elements of human trafficking, victims of smuggling should also not be used for other purposes. So, to consider a person as a victim of smuggling only, other incriminating elements must not be fulfilled.

In the following, the elements that contain the two protocols of the Convention against Transnational Organized Crime, related to human trafficking and migrant smuggling, will be figuratively reflected.

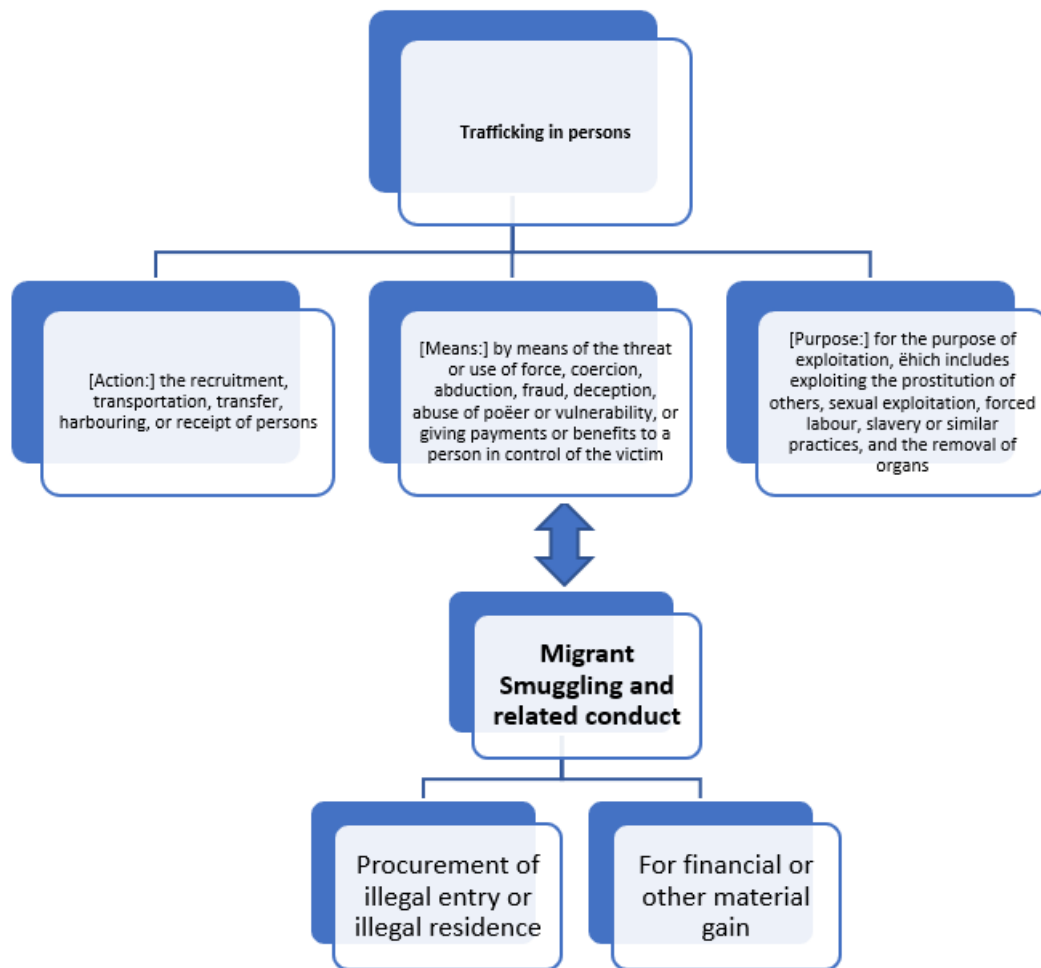


Figure 1. Human trafficking - migrant smuggling (as criminalized by international law) (UNDOC, 2010).

### 3. EU ACTION TO PREVENT AND COMBAT MIGRANT SMUGGLING

#### 3.1. Legal framework

The European Union has adopted a series of instruments that serve as important mechanisms for the prevention, detection, and prosecution of migrant smuggling. The most important instruments that have been approved by the European Union are: the Treaty on the Functioning of the European Union; Council Directive 2002/90/EC of 28 November 2002, defining the facilitation of unauthorized entry, transit and residence; Council framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorized entry, transit and residence; Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985; Directive 2008/115/EC of The European Parliament and of The Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.

The second chapter of the Treaty on the Functioning of the European Union defines rules related to policies and border controls, asylum, and immigration. Articles 77 and 78 also provide special rules regarding border issues, but Article 79 (1) expressly provides that the EU draws up a common policy on immigration and the prevention of illegal immigration and human trafficking, as well as the strengthening of measures to fight these two phenomena (European Union, 2007).

Council Directive 2002/90/EC of 28 November 2002, defining the facilitation of unauthorized entry, transit, and residence, is an important instrument in the EU's efforts to strengthen the fight against illegal immigration. It requires Member States to approve a list of sanctions that includes persons who intentionally help, or for the purpose of material gain, other foreign persons who are not citizens of any EU country, creating conditions for them to enter, transit, or stay illegally (Council of the European Union, 2002a).

In the same year, the Council Framework Decision of 28 November 2002 on the strengthening of the criminal framework to prevent the facilitation of unauthorized entry, transit, and residence was approved. This instrument further complements Council Directive 2002/90/EC. With this instrument, the Member States are obliged to establish criminal penalties for violations committed against 2002/90/EC. In addition to the punishments, depending on the need, complementary punishments can also be imposed in order for the punishments to be effective and convincing. This instrument also foresees the possibility of toughening the punishment if the offense was committed as an organized crime. (Article 1). It is also provided that if legal entities have also contributed to the commission of criminal offenses, then they must be held responsible. However, the type of responsibility that legal entities must bear is not defined here; therefore, criminal responsibility is not explicitly defined. This instrument requires that the punishments imposed on legal entities be effective and convincing. In addition to the main punishments, depending on the assessment of needs, supplementary punishments must also be imposed (Articles 2 and 3). This instrument sets clear standards regarding criminal prosecution and extradition and also takes into consideration the protection offered to asylum seekers and refugees in accordance with international law (Articles 5 and 6; Council of the European Union, 2002b).

Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985 is also an important instrument for preventing and combating illegal migration and, thus, migrant smuggling. The purpose of this directive is to supplement the provisions of Article 26 of the Convention on the implementation of the Schengen Agreement of 14 June 1985 (the Schengen Convention) and to define certain conditions regarding their implementation (Article 1). This directive imposes obligations on carriers carrying third-country nationals in order for them to take concrete measures. Member States shall take the necessary measures to compel carriers who are unable to return a third-country national whose entry is refused to immediately find means of onward transport and bear their cost, or, if immediate transportation is not possible, assume responsibility for the costs of the stay and return of the third-country national in question. This directive expressly foresees the fines that can be imposed on carriers (Articles 2, 3, and 4, Council of the European Union, 2001).

### **3.2. Policy framework: EU action plan against migrant smuggling**

The issue of dealing with migrant smuggling in general, and migrant smuggling by sea in particular, is one of the complex issues that countries have been dealing with for a long time. This challenge is also reflected in the numerous flows of migrants who, using the sea routes, assisted by smugglers, make continuous efforts to enter the territories of different countries. Due to the increase in the number of migrants who are smuggled into the countries of the European Union and the increased risk and threat to the security of the continent, the issue of migrant smuggling has been addressed by the European Union in the EU Security Union Strategy. In this document, it is emphasized that criminal organizations treat migrants and people in need of international protection as commodities. 90% of irregular migrants arriving in the EU are facilitated by a criminal network. Migrant smuggling is also often intertwined with other forms of organized crime, in particular human trafficking. In addition to the huge human cost of trafficking, Europol estimates that the global annual profit generated for all forms of exploitation from human trafficking amounts to 29.4 billion euros. This is a transnational crime fueled by illegal demands from within and outside the EU and affecting all the EU Member States. Due to the poor results in the identification, prosecution, and punishment of these crimes, a new approach is needed (European Commission, 2020).

In the joint report of Europol and INTERPOL (2016), it is emphasized that the facilitation of smuggling of migrants from the sea to the countries of the European Union is used on the south-eastern migration route (via Greece), on the entry route to the Central Mediterranean (via Italy), on the south-western entry route (via Spain), and at the Red Sea crossing (via Yemen) or the Gulf of Aden (Europol & Interpol, 2016). The most used means of transport in 2015 for short distances was the boat, which is usually 8–12 meters long and can carry an average of 30–40 migrants. In most cases, smugglers do not accompany migrants during the crossing from Turkey to Greece. Instead, they are simply instructed on how to maneuver the boats. Large vessels, such as fishing vessels or cargo ships, can also be used on the Central Mediterranean route combined with boats (Europol & Interpol, 2016). An important challenge faced by the EU States was the preservation of the lives of migrants who were exposed to the risk of dying in the European waters. In this regard, EU reports show that since 2015 almost 629,000 lives of smuggled migrants have been saved at sea.

In this direction, the European Union, in its Action Plan against Migrant Smuggling (2015–2020), has foreseen proactive measures to prevent migrant smuggling. One of the aspects that have been assessed as important to address is the identification, capture, and disposal of vessels. In this action plan, it is emphasized that in order to prevent and fight the smuggling of immigrants from the sea, systematic actions will be taken to identify, capture, and destroy the ships destined to be used by smugglers. A list of suspicious vessels that may be used in the Mediterranean will be created. This would include e.g., vessels registered at the end of their lives and slated for scrapping. The relevant EU agencies and the authorities of the Member States must define the risk criteria for the identification of these vessels and ensure that they are systematically monitored, using the European Border Surveillance System (EUROSUR) and the capacities of all agencies (European Commission, 2015). After assessing the safety of people, boats used or intended to be used by smugglers should be systematically towed ashore or thrown into the sea. The Commission and the relevant EU agencies, in particular Frontex, will provide the Member States with financial and technical support to tow vessels ashore and remove them. These efforts should be seen in conjunction with the creation of a Common Security and Defense Policy (CSDP) operation to contribute to the disruption of migrant smuggling networks (European Commission, 2015).

Even in the EU action plan against migrant smuggling (2021-2025), concrete measures are foreseen that must be taken in the direction of preventing and fighting the smuggling of migrants from the sea. The Mare Joint Operational Team (JOT Mare), launched in 2015, supports an intensified exchange of intelligence with the European Border and Coast Guard Agency (Frontex) and close cooperation with Interpol, including the deployment of the Member States' national experts at Europol. It collects, analyzes, enhances, and disseminates intelligence products, supporting dozens of investigations dealing with criminal networks involved in the smuggling of migrants by sea and related unauthorized movements to countries of destination. With the cooperation of Frontex and other partners, more than 1,000 vessels suspected of being involved in migrant smuggling have been included in Europol's databases (European Commission, 2021).

Even in spite of the undertaking of these measures, the territory of the European Union States remains attractive for all migrants; therefore, the efforts to enter the European territory will be continuous despite the efforts made by the European authorities to limit the possibility of access through sea routes.

#### **4. MIGRANT SMUGGLING BY SEA: STANDARDS OF MIGRANT SMUGGLING PROTOCOL**

Chapter II of the Protocol against Smuggling of Migrants deals with the smuggling of migrants by sea. This instrument is an important basis for regulating how to act when a State is confronted with a ship that transports smuggled migrants. The instrument is mainly applied to smuggling carried out on high seas since in the territorial waters where State sovereignty is exercised, the rules of the State in whose territorial waters the ship not registered in that State is found, apply (Obokata, 2010). The Protocol against Smuggling of Migrants is an important step in preventing and combating smuggling by sea. Before the issuance of this instrument, the



legal framework to address the challenging issues in this field was not sufficient. International instruments, including the UN Convention on the Law of the Sea (1982), could have been used to address only some aspects of smuggling (Obokata, 2010). However, this instrument has not greatly expanded the rights of the States to prevent and fight migrant smuggling since it is also based on rules that were only consolidated. Significant progress has been made in the rights that the States have against ships that do not carry the flag of any State (Gallagher and David, 2014).

According to Article 8, paragraph 2 of the Protocol, it is provided that if a State Party has reasonable suspicion that a vessel exercising freedom of navigation in accordance with international law and flying the flag or bearing the registration marks of another State Party is engaged in the smuggling of migrants by sea, it may notify the State whose flag the ship flies. In addition, the State may request confirmation of the registration and, if this registration is confirmed, may request authorization to take appropriate measures in relation to that vessel. The latter State may authorize the requesting State to do the following: a) to board the vessel; b) to search the vessel; and c) if evidence is discovered that the ship is involved in the smuggling of migrants by sea, take appropriate measures regarding the ship, people on board, and cargo on board, in the manner authorized by the State whose flag the ship flies. According to Article 8(3) and (4), if a State Party takes action against a ship where there is a reasonable suspicion of migrant smuggling on board, the State that took the action must immediately notify the State whose flag the ship flies of the actions and the results of the action. A State Party shall also promptly respond to a request from another State Party to determine whether a vessel claiming to be registered with it or flying its flag is authorized to do so and to make a request in accordance with the above descriptions. Whereas in Article 8(5), this instrument provides that a State Party must not take additional measures without the express authorization of the State whose flag the ship carries, except for the measures necessary to reduce the high risk to the lives of persons or for those measures derived from relevant bilateral or multilateral agreements.

Although it is an advancement of the legal framework for dealing with the smuggling of migrants, this international instrument maintains with a strong basis the principle of non-intervention (State sovereignty) in situations where it is estimated that there is a reasonable doubt regarding the involvement of the ship, whose flag is carried by a ship that smuggles migrants inside. In keeping with this principle, the expressions that are included in the content of this instrument are formulated in such a way that it is foreseen that interventions by one person on a ship that carries the flag of another State should be done in a very careful manner and only with clearly expressed approval from the State whose flag the ship carries (Obokata, 2010). Another issue that is challenging to implement in practice is the issue of clarifying the phrase "*has reasonable grounds to suspect*" that there is smuggling of migrants. This aspect is extremely challenging in practice as it can be extremely difficult to detect that a ship is actually smuggling migrants. Smugglers will make efforts to hide immigrants and disguise the vessels to avoid detention and other law enforcement actions (Obokata, 2010). Article 8(2) of the Protocol against Smuggling of Migrants is consistent with the right of visitation on high seas, linked to Article 110 of the Law of the Sea Convention, as it requires the consent of the flag State to exercise the right of visitation against a vessel on the high seas suspected of being involved in migrant smuggling. However, the Migrant Smuggling Protocol affects the expectation and/or duty that a flag State will consent to the boarding and inspection of its vessels by other States (Coppens, 2013).

In Article 8(6), the Protocol against Smuggling of Migrants requires that each State Party designate an authority to respond to requests for assistance, confirm the registration or right of a vessel to fly its flag, and authorize taking appropriate measures. In this regard, other provisions of this instrument provide that if a State Party has reasonable suspicion that a ship is involved in smuggling migrants by sea, it may request the assistance of other State Parties to prevent the use of the ship for this purpose. States Parties that are requested to assist should do so to the best of their abilities. According to Article 8(7), this instrument provides that a State Party that has reasonable grounds to suspect that a vessel is involved in the smuggling of migrants by sea and is stateless or may be regarded as such may enter and inspect the ship, and in the event that evidence is

discovered that substantiates the suspicion, that State Party must take appropriate measures in accordance with relevant domestic and international legislation.

Even though this instrument gives special authorizations to States Parties to intervene in situations where it is assessed that intervention is necessary to prevent and combat smuggling of migrants, enabling them to collect information, arrest and seize, make reasonable use of force, collect evidence for the purposes of criminal proceedings, or address other aspects, it is very important that the law enforcement authorities of the State that has intervened take maximum care to preserve the lives of the people who are on the ship where the migrants are smuggled. This is necessary because most of these vessels are old and neglected, overloaded, and unprepared to operate as vessels in sea waters (UNDOC, 2010).

On the other hand, some researchers estimate that these standards have not produced any special effect in practice since their aim has never been to offer any protection to smuggled or trafficked persons, but their primary aim has been to protect the interests of the countries that have claimed to be at risk of irregular migration. The criminalization of migrant smuggling has served to justify the criminalization of immigration and weaken the protection owed to refugees (Dandurand and Jahn, 2020).

### **5.1. Criminal investigation and prosecution**

The law enforcement authority of the State that conducted the investigation and prosecution is in charge of investigating and prosecuting migrant smuggling by sea. Due to the specifics of the investigation and prosecution of migrant smuggling by sea, the United Nations Convention against Transnational Organized Crime provides for the possibility of establishing teams for joint investigation. According to this instrument, for the implementation of the joint investigation, it is required that the States conclude mutually beneficial bilateral or multilateral agreements (UN General Assembly, 2001).

This criminal offense also stands out as a complex activity since the *modus operandi* of this form of criminality is characterized by the masking of the activity. This type of masking requires law enforcement agencies to conduct extensive, coordinated investigations with relevant authorities both inside and outside the country in order to gather evidence to prove the criminal offense. Due to the nature of the commission of this criminal offense, an advanced and coordinated investigation between law enforcement agencies is necessarily required as is the use of adequate and effective techniques for a complete and independent investigation. In this direction, different investigative techniques are used for the investigation of these criminal offenses respectively: the controlled delivery investigative technique; physical and electronic surveillance; undercover operations; use of informants; and other investigative techniques.

Although the Protocol against Migrant Smuggling has provided some advanced solutions for the investigation and prosecution of migrant smuggling by sea, the States still need cooperation and coordination with each other to carry out successful investigations and prosecutions. Cooperation between the States is a necessity in all stages of the criminal procedure, but also in the pre-criminal procedure phase, i.e., in the phase of gathering information on suspected involvement in criminal offenses involving migrant smuggling.

After receiving information about smuggling by sea, either through denunciation or through discovery by the law enforcement agencies themselves, one of the main issues is the identification of the smuggler. Gathering evidence about the smuggler at this point is vital in order to separate him from the migrants and investigate him and the network behind him accordingly (UNDOC, 2011). The criminal investigation process is quite complicated; this is also due to the fact that the network is distributed in many parts of the globe, which makes it even more difficult to prosecute or even organize a trial for this criminal offense. International cooperation is considered the key to success in combating migrant smuggling. Despite the efforts of a State, in the absence of the cooperation of other States that can help with the investigation and prosecution, success will

not be desirable. Migrant smuggling, as a transnational crime, also requires a response from a transnational front of the States that have the maximum commitment to fighting this form of criminality (UNDOC, 2011).

## **6. CONCLUSION**

The Protocol against Smuggling of Migrants by Land, Air, and Sea is an international instrument that provides a permanent solution to the issue of conceptualizing international cooperation in migrant smuggling issues. This instrument clearly defined the term “*smuggling of migrants*” and specified the elements that make up this concept, giving the States the opportunity to criminalize other elements in order to adapt them to the specifics of their countries. In addition, the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, represents an important instrument for preventing and fighting migrant smuggling. Both of these instruments are important not only for the basis of cooperation among the States but also for the way of acting in situations where it is necessary to act to prevent and fight migrant smuggling and human trafficking. Migrant smuggling and human trafficking routes are different, but one of the most common ways to reach Europe is by sea, by ship, or other means of navigation.

Due to the unity that the European Union promotes within itself on topics of importance to the Union, even the issue of migrant smuggling has a unified approach within the organization as this issue has become an important part of the EU Security Union Strategy, and migrant smuggling is considered one of the common threats to the organization and the Member States. Preventing and combating migrant smuggling by sea is also given serious consideration in the two EU action plans against migrant smuggling. The EU action plan against migrant smuggling (2021-2025) foresees concrete measures that must be taken in order to prevent and fight the smuggling of migrants by sea. Several EU agencies are included in this plan as it is the role of the Member States that must fulfill their obligations regarding the prevention and combating of migrant smuggling by sea. Due to the large number of migrants who intend to reach EU countries by sea, the action plan calls for the identification of vessels that can be used by smugglers to get to the EU. In addition, the action plan contains the way to react when it is necessary to save the lives of migrants, which since 2015 has saved more than half a million lives.

An important part of the provisions of the Protocol against Smuggling of Migrants by Land, Air, and Sea is given to the smuggling of migrants by sea. This instrument has further facilitated the issue of preventing and combating the smuggling of migrants, as this can serve as an important basis for countries that have suspicions of involvement in the smuggling of migrants on any ship sailing on high seas. The authorities of that country can then intervene and make the necessary checks to prevent and fight the smuggling of migrants. In situations where the ship has a flag and is registered in a third country, the approval of that country would be needed, while in the case of ships that do not have a flag and are not registered in any country, the intervening country has full authorization to act.

Investigating and prosecuting migrant smuggling is one of the many mechanisms aimed at preventing and reducing the number of smuggling cases. At the same time, investigating migrant smuggling by sea is one of the most complex issues. For successful criminal investigation and prosecution, advanced crime investigation methods are used, starting with the controlled delivery investigative technique, physical and electronic surveillance, undercover operations, the use of informants, and other investigative techniques. A successful investigation necessarily requires international cooperation, which can be facilitated by the Convention against Transnational Organized Crime.

## **CONFLICT OF INTEREST**

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## REFERENCES

- Aljehani, A., 2015. The Legal Definition of the Smuggling of Migrants in Light of the Provisions of the Migrant Smuggling Protocol. *The Journal of Criminal Law*, 79(2), pp. 122-137. Available at: <https://doi.org/10.1177/0022018315576734>
- Brolan, C., 2002. An analysis of the human smuggling trade and the Protocol Against the Smuggling of Migrants by Land, Air and Sea (2000) from a refugee protection perspective. *International Journal of Refugee Law*, 14(4), pp. 561-596. Available at: <https://doi.org/10.1093/ijrl/14.4.561>
- Coppens, J., 2013. Migrants at sea: a legal analysis of a maritime safety and security problem (Doctoral dissertation, Ghent University). Available at: <https://biblio.ugent.be/publication/4303851>
- Council of the European Union, 2001. COUNCIL DIRECTIVE 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001L0051>
- Council of the European Union, 2002a. Council Directive 2002/90/EC of 28 November 2002 Defining the Facilitation of Unauthorized Entry, Transit and Residence, 28 November 2002. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32002L0090>
- Council of the European Union, 2002b. Council Framework Decision 2002/946 on the Strengthening of the Penal Framework to Prevent the Facilitation of Unauthorized Entry, Transit and Residence, 28 November 2002, 11015/01, available at: [eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32002F0946](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32002F0946)
- Dandurand, Y. and Jahn, J., 2020. The failing international legal framework on migrant smuggling and human trafficking. *The Palgrave international handbook of human trafficking*, pp. 783-800. Available at: [https://doi.org/10.1007/978-3-319-63058-8\\_47](https://doi.org/10.1007/978-3-319-63058-8_47)
- European Commission, 2015. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. EU Action Plan against migrant smuggling (2015 - 2020). COM (2015) 285 final, Brussels, 27.5.2015. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52015DC0614>
- European Commission, 2020. Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions on the EU Security Union Strategy, COM/2020/605, Brussels, 24.7.2020. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0605>
- European Commission, 2021. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A renewed EU action plan against migrant smuggling (2021-2025), COM (2021), 591 final. Brussels, 29.9.2021. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2021:591:FIN>
- European Union, 2007. Consolidated version of the Treaty on the Functioning of the European Union, 13 December 2007, 2008/C 115/01, available at: [https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC\\_2&format=PDF](https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_2&format=PDF)
- Europol & Interpol, 2016. Joint Report - Migrant Smuggling Networks. Available at: <https://www.europol.europa.eu/publications-events/publications/europol-interpol-report-migrant-smuggling-networks>
- Gallagher, A., 2001. Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis. *Human Rights Quarterly*, 23 (4), pp. 975 – 1004. Available at: <http://www.traffickingroundtable.org/wp-content/uploads/2012/07/Human-Rights-and-the-New-UN-Protocols.pdf>
- Gallagher, A.T. and David, F., 2014. *The international law of migrant smuggling*. Cambridge University Press.

Iselin, B. and Adams, M., 2003. Distinguishing beaten human trafficking and people smuggling. UN Office on Drugs and Crime, pp.1-10.

Obokata, T., 2010. The legal framework concerning the smuggling of migrants at sea under the UN protocol on the smuggling of migrants by land, sea and air. In Extraterritorial immigration control (pp. 147-162).

UN General Assembly, 2000a. Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime, 15 November 2000. Available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/protocol-against-smuggling-migrants-land-sea-and-air>

UN General Assembly, 2000b. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, 15 November 2000. Available at: <https://www.refworld.org/docid/4720706c0.html>

UN General Assembly, 2001. United Nations Convention against Transnational Organized Crime: resolution / adopted by the General Assembly, 8 January 2001, A/RES/55/25. Available at: <https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html>

UNDOC, 2010. A short introduction to migrant smuggling. Available at: [https://www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Issue-Papers/Issue\\_Paper\\_-\\_A\\_short\\_introduction\\_to\\_migrant\\_smuggling.pdf](https://www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Issue-Papers/Issue_Paper_-_A_short_introduction_to_migrant_smuggling.pdf)

UNDOC, 2011. Issue Paper: Smuggling of Migrants by Sea. Available at: [https://www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Issue-Papers/Issue\\_Paper\\_-\\_Smuggling\\_of\\_Migrants\\_by\\_Sea.pdf](https://www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Issue-Papers/Issue_Paper_-_Smuggling_of_Migrants_by_Sea.pdf)

UNDOC, 2018. Global Study on Smuggling of Migrants 2018. Available at: [https://www.unodc.org/documents/data-and-analysis/glosom/GLOSOM\\_2018\\_Global\\_web\\_small.pdf](https://www.unodc.org/documents/data-and-analysis/glosom/GLOSOM_2018_Global_web_small.pdf)

UNODC, 2010. Toolkit to Combat Smuggling of Migrants. Tool 7: Law enforcement and prosecution. Available via UNODC. Available at: [https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2019/05/report/toolkit-to-combat-smuggling-of-migrants/10-50895\\_Tool7\\_ebook.pdf](https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2019/05/report/toolkit-to-combat-smuggling-of-migrants/10-50895_Tool7_ebook.pdf)